

Syllabus

·IN THE MATTER OF
EL MORO CIGAR COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 2603. Complaint, Oct. 31, 1935—Decision, Feb. 21, 1939

Where a corporation engaged in the manufacture of various brands of cigars, and in sale and distribution thereof to wholesale and retail dealers in various States for resale to members of the purchasing public, in substantial competition with others engaged in similar sale and distribution of cigars, and including among said competitors thus engaged (1) many who sell such products composed in whole, and also such products composed in part, of Havana tobacco, and truthfully advertise, represent, brand, and label their said products as containing such tobacco; (2) many who sell and distribute such products containing none of such tobacco, but only tobacco grown in the United States or elsewhere than on the Island of Cuba and do not brand, label, advertise, or otherwise represent their said products as containing any tobacco grown on said island; and (3) those who thus sell and distribute cigars which, by reason of imperfections in shape, size, or other respects, are culled or removed from lots of higher grade and more expensive cigars and, by reason of their odd shapes, sizes, and other imperfections, are correctly designated as "Throw Outs" or by other words of similar import, and sold at materially reduced prices, and are truthfully advertised, branded, and labeled by them as aforesaid—

(a) Branded or labeled as "Havana Counts" certain of its said cigars and featured said words on the exterior and on the interior of the containers thereof, and also displayed on exterior of such containers, and on the inside of the lids thereof, words "Original Old Style" and "Guaranteed Hand Made Imported and Domestic Stock," and later discontinued said last-named phrase and placed on top and sides of exterior of its said containers, in much smaller type than "Havana Counts," words "Domestic Filler Domestic Wrapper," and thereafter discontinue also, on inside of lid of containers, phrase referred to and inserted, in much smaller type than words "Havana Counts," "Notice! These cigars are made in the United States entirely and only of domestic tobacco," facts being none of the cigars made, sold, and distributed by it under aforesaid "Havana Counts" label at any time contained any Havana tobacco or tobacco grown on island of Cuba, long imported into the United States and there widely used in manufacture of cigars, and long associated by word "Havana" with tobacco grown on said island, on which, and in vicinity of Havana, is grown finest cigar tobacco, and notice aforesaid was contradictory and inconsistent with representation contained in use of word "Havana" and did not place purchasers of product in question on notice or sufficiently inform them that such products were not made from and did not contain Havana tobacco, but were made only and entirely from the domestic product, with effect of misleading and deceiving substantial portion of members of the purchasing public situated in various States of the United States into the erroneous and mistaken belief, through use as aforesaid of word "Havana" and words "Guaranteed

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Hand Made Imported and Domestic Stock," that such cigars were made from tobacco grown on the island of Cuba; and

- (b) Branded, labeled and designated certain of its said cigars as "Throw Outs" and "Factory Throw Outs," and later displayed and featured words, on exterior and interior of containers of certain of its said cigars, "REES' FAMOUS TAKE-OUTS 2 FOR 5¢," and displayed on inside of lids of containers of said "Throw Outs," words "Factory Throw Outs" and "Throw Outs from 10¢ And Up Sizes," and for a time also displayed on inside of lid of said "Take Outs" words "Odd sizes and Shapes," notwithstanding fact none of the cigars thus designated were of that type commonly known and understood by cigar dealers and purchasing public as "Throw Outs" or "Take Outs," or culls or discards, which, by reason of certain defects or imperfections, are removed or thrown out or taken out from more expensive lots and brands of cigars during process of manufacture, and sold at reduced price by reason of such defects or imperfections, but said cigars were made by it to be sold at retail for 2 for 5 cents, in simulation of a throw-out or take-out cigar, and from a grade of tobacco which permitted it to make and sell said cigars at such prices for a profit, with effect, through use of words "Take Outs" and "Odd Sizes and Shapes," of misleading and deceiving substantial portion of members of the purchasing public in various States into the erroneous and mistaken belief that they were buying a higher-priced cigar, made of high-grade tobacco, and sold at a reduced price as culls, rejects, or "Throw Outs," because of the odd sizes and shapes and because of defects or imperfections in manufacture thereof;

With result that, through use of such false and misleading statements and representations, it deceived members of the purchasing public in various States concerning the quality and character of its cigars thus sold and distributed by it, and thereby induced members of public to purchase said cigars under erroneous and mistaken belief that such false and misleading statements and representations were true, and trade was diverted unfairly to it from its competitors in such commerce who truthfully advertise, represent and label their respective products, to the injury of competition in commerce, and with result of placing in hands of its dealers and distributors an instrument by means of which they mislead and deceive, and have misled and deceived, members of purchasing public in various States:

Held, That such acts and practices were all to the prejudice and injury of the public and competitors and constituted unfair methods of competition.

Before *Mr. Robert S. Hall*, trial examiner.

Mr. Marshall Morgan and *Mr. Astor Hogg* for the Commission.

Crawford & May, of Jacksonville, Fla., for respondent.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission having reason to believe that El Moro

Cigar Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, El Moro Cigar Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business at 636 South Elm Street, in the city of Greensboro, N. C. Respondent is now and for more than 3 years last past has been engaged as hereinafter described in the business of manufacturing various brands of cigars and selling and distributing the same to dealers in various parts of the United States, more particularly in the States of North Carolina, South Carolina, Georgia, Florida, Virginia, and Maryland. The said cigars are manufactured by respondent in Greensboro, N. C., where they are packed, branded, and labeled by respondent for sale and distribution by itself and by its dealer-customers to the purchasing and consuming public of the United States. In consummating such sales and in distributing such products, respondent causes the cigars so sold to be transported and delivered from its place of business in Greensboro, in the State of North Carolina, through and into various other States of the United States to the respective purchasers thereof at their respective points of location. In the course and conduct of its business the respondent has been and is now engaged in direct and substantial competition with various corporations, partnerships, and individuals likewise engaged in the sale and distribution of cigars, and offering such products for sale in commerce between and among the various States of the United States and within the District of Columbia.

PAR. 2. The cigar originated in the Spanish West Indies. The finest quality of tobacco for cigar purposes is grown in Cuba, not far from the city of Havana. The word "Havana," also spelled "Habana," is the name and designation of the tobacco grown on the island of Cuba, which name and designation is and has been since time immemorial used and understood by the cigar-purchasing and consuming public of the United States, and by cigar manufacturers and dealers throughout the United States, as meaning and designating tobacco which has been grown on the island of Cuba. Said tobacco has long been imported into the United States and widely and extensively used and consumed therein in cigars manufactured in whole and in part only from such tobacco. Such Havana tobacco has the reputa-

tion among the cigar consuming and purchasing public of the United States as being cigar tobacco of highest quality and excellence, and cigars made in whole or in part from said tobacco are in large demand throughout the United States. Many of the cigar dealers and many of the consuming public of the United States prefer to purchase cigars containing Havana tobacco and have believed, and still believe, that the use of such Havana tobacco in cigars adds to and increases the quality and desirability of such cigars.

The outer leaf, or wrapper, of a cigar comprises about 5 percent of the entire cigar, while the filler and binder, constituting 95 percent of the cigar, are the controlling factors in its size, strength, and flavor. The filler controls, primarily, the designed length, thickness, and shape of the cigar as rolled into a binder or binder wrapper of desired size. A dark cigar can be mild if it has a mild filler and binder, while a light-colored cigar can be quite strong if the filler and binder are of a strong grade of leaf. The filler of the cheapest grades of cigars, such as "2 for 5's," is composed principally of what is known as "scrap," being clippings from cigars in the process of manufacture.

The expressions "throw-outs" and "take-outs" are similar in import and meaning in connection with the manufacture of cigars, and indicate and are intended to indicate culls, or discards, which, by reason of certain defects or imperfections, are removed or thrown or taken out from more expensive lots and brands of cigars and sold at a reduced price by reason of such defects or imperfections.

PAR. 3. In the course and conduct of respondent's business as described in paragraph 1 hereof, sales of cigars are made and purchase orders therefor obtained through and as a result of the personal solicitation of salesmen, the use of circulars and by means of written correspondence and other communications with respondent's customers and prospective customers.

The said cigars, manufactured, sold, and distributed competitively by respondent in interstate commerce, as set forth in paragraph 1 hereof, are and for several years last past have been sold and distributed by respondent in large and substantial quantities under such names and brands, among others, as "Havana Counts," "Rees' Famous Take-Outs," and "R S M Famous Take-Outs," each of said brands comprising cigars sold 2 for 5 cents. The following hereinafter-described brands and labels have been affixed by respondent to the cigars themselves and to the containers thereof. The labels attached to the cigars themselves consist of a paper band placed by respondent around each cigar and bearing conspicuously the words "Havana Counts," or the words "Famous Take-Outs," as descriptive of the

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cigars. The containers for such cigars are the usual and customary cigar boxes or cigar containers of respective capacities of 50 and 100 cigars each. The labels and brands attached to each box or container have been designed and affixed thereto by respondent and are as follows:

1. Centered on the outside of the lid of the box a label or brand bearing the words "Havana counts" in large, white letters on a ribbon-like background of solid black. To the left and above this brand appear the words "Original Old Style." In smaller black type, below the brand, are printed the words "Guaranteed Hand Made Imported and Domestic Stock." To the right of the brand appears a facsimile of the stamp or insignia of the "NRA." Around the edges of the box on both top and sides, spread an inch or more apart, appear the words, alternately used, "Counts—Havana—Counts."

The above-described brand and labeling are carried also on the under side of the box top, the words "Havana Counts" printed in large, heavy black type on a white ribbon field appearing conspicuously when the box is opened. On the under side of the top also appear the words "Havana Counts." Beneath this, the words "Process Tax Paid" and in a black-lined border or box, the following:

The Cigars herein contained
were manufactured to retail
at not more than Five Cents
each and are so tax paid.

The "N. R. A." insignia and the legend "2 for 5¢" complete the descriptive matter appearing on the outside front of the box or container. On the inside of the box on its back wall or surface, near the top, are printed in large type the words "Havana Counts," and on either side the legend "2 for 5 cts." The left outside end of the box contains the words "Havana Counts" printed in bold, heavy type, black on a white background. Above this brand appear the words "Original Old Style" and below it, the words "Guaranteed Hand Made."

2. Centered on the outside of another box, a brand or label reading:

REES'
FAMOUS TAKE-OUTS
TITLE REGISTERED
2 for 5¢

At each end of the outside top, again appears the legend "2 for 5¢," and at the upper left corner the insignia of the "N. R. A."

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On the inside of the box top, showing conspicuously when the lid thereof is lifted, the following brand or label is printed in bold red letters nearly an inch and a half tall:

REES
FAMOUS TAKE-OUTS

To the left of the brand there are respectively printed the legend "2 for 5¢," the insignia of the "N. R. A.," and the words:

ALL GOOD SMOKES ODD SIZES AND SHAPES

To the right of the brand appears the same legend:

ALL GOOD SMOKES
ODD SIZES & SHAPES

and again the further legend, "2 for 5¢." Beneath the red label or brand appear the words "Title Registered," and below these, printed in a long box in conspicuous blue type, the following:

Every Cigar a Splendid Quality, Mild, Free-Burning Smoke—Made from Tobacco Especially Selected for Its Ripeness and Fragrance—Tobacco from all the Choice Growing Sections. Blended to Please 100% of the Smokers.

On the inside of the box or container, on the back side, at the top, and likewise easily visible when the box top is lifted, again appears the brand, this time printed in large blue letters:

REES FAMOUS TAKE-OUTS

and at the other end again the legend "2 for 5¢."

On the outside front of the box the brand "Rees Famous Take-Outs" is printed in black type and beneath, the legend "Process Tax Paid." To the right of this label, carried in a box, is printed the following, in small, inconspicuous type:

The Cigars Herein Contained Were Manufactured to Retail at Not More Than Five Cents Each and Are So Tax Paid.

On each outside end of the box, printed in black type, appears the brand:

REES
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PAR. 4. In connection with the operation of said business, the brand of cigar heretofore referred to and described as "Rees' Famous Take-Outs" was originated by the president of respondent company and put on the market about January 1, 1933. Prior to this time, that is, from July 30, 1932, until December 23, 1932, respondent company manufactured what were termed and branded "Throw-Outs," at 2 for 5¢.

On March 27, 1931, respondent company purchased from Herman Hyman's Sons, of Sinking Springs, Pa., property rights in and to the trade name "*Havana Counts*," and subsequent to such time, respondent has been manufacturing and selling in interstate commerce, also at a price of 2 for 5 cents, the cigar hereinbefore described and known as "*Havana Counts*."

The "*Rees' Famous Take-Outs*" are manufactured especially for the trade, being put up in boxes of 100 each. Approximately 14,000 of these "*Take-Outs*" are sold a month. About 3,000 boxes of "*Havana Counts*" are manufactured and sold each month, or 300,000 cigars of that brand. "*Take-Outs*" are made in six different sizes. Neither "*Rees' Famous Take-Outs*" nor the "*Havana Counts*" are uniform in size and shape, owing to variations in the blocks used in their manufacture.

Both the "*Take-Outs*" and the "*Havana Counts*" are and have been made from what is termed "No. 2 Scrap," alleged to contain "some little imported tobacco." Respondent has no warehouse of its own and does not mix its own filler tobacco, but, on the contrary, purchases the same ready-mixed from factories and dealers located in the State of Pennsylvania. Said "Scrap No. 2" consists of clippings gathered from cigars in the process of their manufacture, the same being mixed by the said Pennsylvania concerns which sell the said "scrap" to respondent. Respondent has no personal knowledge that, or as to whether, the "No. 2 Scrap" tobacco used by it as fillers for its "*Havana Count*" and "*Take-Out*" brands contains any, or any appreciable amount, of Cuban, or other imported tobacco.

PAR. 5. On or about April 1, 1935, respondent changed the labeling of its boxes intended as containers for "*Havana Counts*" by printing on the outside top thereof, beneath the brand "*Havana Counts*," the legend:

Domestic Filler
Domestic Wrapper

and on the inside of the cover, beneath the brand reading

Havana Counts
Guaranteed
Hand Made—Imported
and Domestic Stock

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the following:

Notice! These Cigars are made
in the United States entirely
and only of domestic tobacco.

On one end of the new boxes the label was made to read:

Domestic Filler
HAVANA COUNTS
Domestic Wrapper.

On another of the new boxes the outside top contains the original legend:

Guaranteed
Hand Made
Imported and Domestic Stock.

The brand "Havana Counts" is printed in heavy type in both the outside front and top of the box as well as on the inside of the top and at the bottom of the top appears the above-quoted "Notice," printed again beneath the legend, "Guaranteed Hand Made Imported and Domestic Stock."

Notwithstanding the addition on April 1, 1935, of the legend, "Notice: These cigars are made in United States entirely and only of domestic tobacco," respondent did not change the label theretofore employed on the "Havana Counts" cigar, and each of the said cigars now carries and has at all times heretofore carried a label in red and white design, on which are printed in black the words "Havana Counts."

About September, 1935, a new label was put out for "Rees' Famous Take-Outs," from which were deleted the words, "Odd Shapes and Sizes."

PAR. 6. In truth and in fact none of respondent's cigars branded, labeled, advertised, and described as "Havana Counts" and sold by the respondent and by dealers to the purchasing and consuming public as hereinbefore described, contain any Havana tobacco or tobacco grown on the island of Cuba nor have they at any time contained such tobacco, but are and have been manufactured entirely from, and wholly composed of, tobacco grown in the United States. The effect of the use of the word "Havana" in said designation "Havana Counts" in branding, labeling, describing, and advertising said cigars containing no Havana tobacco, all as hereinbefore set forth, is misleading and has, and has had, the capacity and tendency to and did mislead and deceive a large and substantial number of the purchasing and consuming public into purchasing said cigars in the erroneous belief that they are and were composed in whole or in part of Havana tobacco, that is, tobacco grown on the island of Cuba.

Further, in truth and fact none of respondent's cigars manufactured, branded, labeled, advertised, and sold by the respondent to the purchasing and consuming public as "Rees' Famous Take-Outs" or "Take-Outs" as hereinbefore described, consist of that type of cigar commonly known as a "throw-out" or "take-out" but are and have been manufactured to be sold at and for 2 for 5 cents, in simulation of a "throw-out" or "take-out," from a grade of "scrap" tobacco which would and does permit respondent to manufacture and sell them at a larger profit. The effect of the use of the term "Take-Outs" in said designation "Rees' Famous Take-Outs" and in the further use of the legend "Odd Sizes and Shapes" in advertising, branding, labeling, and describing said cigars was and is misleading and has, and has had, the capacity and tendency to and did and does misled and deceive a large and substantial number of the purchasing and consuming public into the erroneous belief that they are and were getting a higher-priced cigar, made of high-grade tobacco, and sold to them at a reduced price because of odd sizes and shapes or for other defect or imperfection.

PAR. 7. Among the competitors of respondent referred to in paragraph 1 hereof there are many who sell and distribute in competition with respondent cigars composed in whole and also cigars composed in part only of Havana tobacco and who rightfully and truthfully advertise, represent, brand, and label such cigars as containing said Havana tobacco. There are also many of said competitors who sell and distribute, between and among the several States in competition with respondent, cigars containing no Havana tobacco, and being composed wholly of tobacco grown in the United States or elsewhere than on the island of Cuba, and who do not brand, label, advertise, or otherwise represent that said cigars contain any Havana or Cuban tobacco.

There are also various competitors who sell and distribute, between and among the several States in competition with respondent cigars which by reason of imperfections in shape, size, or other respect, are culled or removed from lots of higher grade, more expensive cigars, and which by reason of their odd shapes and sizes and other imperfections are designated as "throw-outs" or "take-outs" or words of like import and meaning, are sold at materially reduced prices, and are rightfully and truthfully advertised, represented, branded, and labeled as "Throw-Outs," "Take-Outs," or in other words and terms of like import and meaning.

Respondent's so-called "Havana Counts" and "Rees' Famous Take-Outs" cigars are displayed, offered for sale, and sold to the consuming public by respondent and in and by cigar stores and

other dealer-establishments in competition with the said cigars of competitors. The respondent's use of the word "Havana" and of the words or expression "Take-Outs" as hereinabove described in relation to cigars having no Havana tobacco and cigars which are not "culls," "Take-Outs," or "Throw-Outs," respectively, are false and misleading. As a result of such false and misleading representations on the part of respondent the consuming public is being and has been injured, trade is being and has been diverted to respondent from such competitors in interstate commerce and thereby substantial injury is done and has been done by the respondent to substantial competition in interstate commerce and there is and has been placed in the hands of respondent's dealers and distributors an instrument by means of which they mislead and deceive and have mislead and deceived the purchasing public.

PAR. 8. Said representations of respondent contained in its respective brands, labels, advertisements, circulars, or other media through which the trade and consuming public are reached have resulted in injury to respondent's competitors and to retail dealers, and to the prejudice of the buying public, and constitute unfair methods of competition within the intent and meaning of Section 5 of an Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on October 31, 1935, issued and thereafter served its complaint in this proceeding upon respondent, El Moro Cigar Co., charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony, and other evidence in support of the allegations of said complaint were introduced by Marshall Morgan and Astor Hogg, attorneys for the Commission, and in opposition to the allegations of the complaint by Crawford & May, attorneys for the respondent, before Robert S. Hall, an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final hearing before the Commission on the said complaint, the answer thereto, testimony and other evidence, and briefs in support of the complaint and in opposition thereto, oral argument not having been requested; and the Commission, having duly considered

the matter, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, El Moro Cigar Co., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, and having its principal office and place of business at 636 South Elm Street, in the city of Greensboro, State of North Carolina.

PAR. 2. Respondent is now, and has been for more than 3 years last past, engaged in the business of manufacturing, selling, and distributing various brands of cigars. Respondent sells substantial quantities of said cigars to wholesale and retail dealers situated in various States of the United States for resale to members of the purchasing public, and causes the said cigars, when sold by it, to be transported from its aforesaid place of business in the State of North Carolina to the purchasers thereof at their respective points of location in various States of the United States other than the State of North Carolina. The cigars are manufactured by the respondent at its aforesaid place of business in the State of North Carolina where they are packed, branded, and labeled by respondent, as hereinafter described, for sale and distribution to the aforesaid purchasers of said cigars. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce in said cigars among and between various States of the United States.

PAR. 3. In the course and conduct of its business as aforesaid, respondent has been during all the times mentioned herein, and is now, in substantial competition with other corporations and with firms, individuals, and partnerships engaged in the sale and distribution of cigars in commerce among and between various States of the United States.

PAR. 4. In the course and conduct of its business as aforesaid, respondent sells and distributes, and has sold and distributed, the cigars manufactured by it under various names and brands, to wit: "Havana Counts," "Throw Outs," and "Rees' Famous Take-Outs." The containers in which respondent sells and distributes said cigars as aforesaid are the usual and customary cigar boxes of a capacity of either 50 or 100 cigars each. Said cigars sell at retail at 2 for 5 cents.

Respondent brands, labels, and describes its cigars which it sells and distributes as aforesaid in the manner hereinafter described.

The words "Havana Counts" appear in large letters on the tops and sides of the containers or boxes in which respondent sells and distributes as aforesaid its cigar designated as "Havana Counts." There has also appeared on the exterior of said containers the words "Original Old Style," and the words "Guaranteed Hand Made Imported and Domestic Stock." There also appear repeatedly around the exterior edges of said containers the words, alternately used: "Counts Havana Counts." On the inside of the lid of said containers the words "Havana Counts" appear in large heavy black type on a white background. There has also appeared on the inside of the lid the words "Original Old Style," and the words "Guaranteed Hand Made Imported and Domestic Stock."

In the year 1935 respondent made certain changes in the wording on the labels on the containers of its said "Havana Counts" cigars. The words "Havana Counts" continued to appear in large letters on the outside of the container, and on the top and sides of the exterior of said containers respondent inserted the words "Domestic Filler Domestic Wrapper," respondent discontinuing the use of the words "Guaranteed Hand Made Imported and Domestic Stock" on the outside of said container. The words "Domestic Filler Domestic Wrapper" were printed in much smaller type than the words "Havana Counts." In the year 1935 the respondent discontinued the use of the words "Guaranteed Hand Made Imported and Domestic Stock" on the inside of the lid of said container. In the year 1935 respondent inserted on the inside of the lid of said container the words "Notice! These cigars are made in United States entirely and only of domestic tobacco." Respondent continued to use the words "Havana Counts" in large black letters on a white background on the inside of the lid, the language comprising the aforesaid "Notice" being printed in much smaller type than the words "Havana Counts." During all the times mentioned herein, the cigars sold and distributed by respondent in said containers were encircled by a band bearing a label containing two words, "Havana Counts."

In the course and conduct of its business as aforesaid, the respondent, prior to December 1932, sold and distributed a cigar which it designated as "Throw Outs," and "Factory Throw Outs." On the inside of the lid of the containers in which such cigars were sold and distributed there appeared the words "Factory Throw Outs" and the words "Throw Outs From 10¢ And Up Sizes." Subsequent thereto respondent sold and distributed, and is now selling and distributing in commerce, among and between various States of the United States, a cigar which it designates as "Rees' Famous Take-Outs." Said cigars are sold and distributed by respondent as afore-

said in containers or boxes on the exterior of which there appear in large letters on the sides and on the top the words "Rees' Famous Take-Outs 2 For 5¢." On the inside of the lid of said containers there appear the words "Rees' Famous Take-Outs" in large red letters on a white background. During the year 1935 and at various times prior thereto there also appeared on the inside of said lid the words "Odd Sizes and Shapes."

PAR. 5. The brand or label reading "Havana Counts," printed in large letters on the exterior and on the inside of the container of said cigars manufactured, sold, and distributed by the respondent as aforesaid, is legible at a distance of from 15 to 25 feet away. The words in small type appearing on the inside of said lid and used by respondent subsequent to 1935 and reading "Notice! These cigars are made in United States entirely and only of domestic tobacco," are illegible except from a short distance from the eye and cannot be read farther away than a distance of 3 to 5 feet. A very small percentage of the members of the purchasing public read the small type statements appearing on cigar-box labels. The average customer going into a store to buy a cigar does not stop to read the statements in small type on cigar boxes but does read the brands or labels prominently displayed on cigar boxes, such as the label "Havana Counts," displayed on respondent's cigar boxes as aforesaid.

PAR. 6. The finest quality of tobacco used in the manufacture of cigars is grown on the island of Cuba near the city of Havana. The word "Havana" is the name and designation of the tobacco grown on the island of Cuba, which name and designation is and has been since the origin of the cigar used and understood by the cigar purchasing and consuming public throughout the United States, and by cigar manufacturers and dealers throughout the United States, as meaning and designating tobacco grown on the island of Cuba. Such tobacco has been for many years, and is now, imported into the United States and is, and has been, widely used in the manufacture of cigars in the United States. Havana tobacco has had, and now has, the reputation among a substantial number of members of the cigar purchasing public throughout the United States as being tobacco of the highest quality and excellence, and cigars made in whole or in part from said tobacco are in great demand throughout the United States. A substantial number of members of the purchasing public and cigar dealers situated in various States of the United States prefer to purchase cigars containing Havana tobacco, and have believed during all the times mentioned herein, and now believe, that the use of Havana tobacco in the manufacture of cigars adds to and increases the quality and desirability of cigars.

PAR. 7. None of the cigars manufactured, sold, and distributed by the respondent as aforesaid under the label "Havana Counts" contain any Havana tobacco or tobacco grown on the island of Cuba, nor have such cigars at any of the times mentioned herein contained such tobacco, but are, and have been during all the times mentioned herein, manufactured entirely from tobacco grown in the United States.

PAR. 8. Based upon the testimony of cigar manufacturers, dealers, and smokers situated in various States of the United States, the Commission finds that the statement "Notice! These cigars are made in United States entirely and only of domestic tobacco" placed on the boxes containing the cigars sold and distributed under the designation "Havana Counts," when used in conjunction with the principal brand name and label on said boxes, to wit, "Havana Counts," does not qualify or explain respondent's representation by the use of the word "Havana" that such cigars are made from tobacco grown on the island of Cuba, but is contradictory and inconsistent with such representation. A substantial number of the members of the purchasing public have the understanding and belief that cigars branded, labeled, or described with the word "Havana" are cigars made from tobacco grown on the island of Cuba, and the use of such aforesaid notice to the effect that said cigars are in fact made from domestic tobacco solely does not in fact place the purchasers of such cigars on notice, or sufficiently inform them that said cigars are not made from and do not contain Havana tobacco but are made only and entirely from domestic tobacco.

PAR. 9. The expression "Throw Outs," and words of similar import and meaning, such as the words "Take Outs," are understood in the cigar trade and by a substantial number of members of the purchasing public situated in various States of the United States to indicate culls or discards which by reason of certain defects or imperfections are removed or thrown out or taken out from more expensive lots and brands of cigars during the process of manufacturing and are sold at a reduced price by reason of such defects or imperfections.

PAR. 10. None of the cigars manufactured, sold, and distributed by the respondent as aforesaid, under the brand or label "Rees' Famous Take Outs," or "Take Outs," are of that type of cigar commonly known and understood by cigar dealers and the purchasing public as "Throw Outs" or "Take Outs," or culls or discards, as hereinbefore described, but are, and have been, manufactured by the respondent to be sold at retail for 2 for 5 cents in simulation of a "Throw Out" or "Take Out" cigar from a grade of tobacco which

permits respondent to manufacture and sell said cigars at such prices for a profit.

PAR. 11. Among the competitors of the respondent referred to in paragraph 3 hereof are many who sell and distribute in commerce among and between the various States of the United States, in competition with respondent, cigars, composed in whole, and also cigars composed in part, of Havana tobacco and who truthfully advertise, represent, brand, and label such cigars as containing Havana tobacco. There are also among said competitors of respondent many who sell and distribute in commerce, among and between the various States of the United States, in competition with respondent, cigars containing no Havana tobacco, but containing tobacco grown in the United States or elsewhere than on the island of Cuba, and who do not brand, label, advertise, or otherwise represent that said cigars contain any tobacco grown on the island of Cuba.

There are also various of the respondent's said competitors who sell and distribute in commerce among and between the various States of the United States in competition with respondent, cigars which by reason of imperfections in shape, size, or other respect are culled or removed from lots of higher grade—the more expensive cigars—and which by reason of their odd shapes and sizes and other imperfections are correctly designated as "Throw Outs" or words of similar import and meaning, and which are sold at materially reduced prices and are truthfully advertised, branded and labeled by said competitors as "Throw Outs" or other words of similar import and meaning.

PAR. 12. The use by the respondent of the word "Havana" in the manner aforesaid and the use by the respondent of the word "Havana" in conjunction with the words "Guaranteed Hand Made and Imported Stock" to describe, brand, and label its cigars made from tobacco grown in the United States have the capacity and tendency to, and do, mislead and deceive, and have misled and deceived a substantial portion of members of the purchasing public situated in various States of the United States into the erroneous and mistaken belief that such cigars are and were made from tobacco grown on the island of Cuba.

The use by the respondent of the words "Take Outs" in the manner aforesaid and the use by the respondent of the words "Take Outs" in conjunction with the words "Odd Sizes and Shapes" to describe, brand, and label its cigars which are not factory "Throw Outs" or "Take Outs," culls or rejects, as such terms are understood in the cigar trade and by the purchasing public as aforesaid, have the capacity and tendency to, and do, mislead and deceive and have misled and deceived,

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a substantial portion of members of the purchasing public situated in various States of the United States into the erroneous and mistaken belief that they are purchasing a higher priced cigar made of high-grade tobacco and sold at a reduced price as culls, rejects, or "Throw Outs" because of the odd sizes and shapes and because of defects or imperfections in the manufacture of such cigars.

By the use of the aforesaid false and misleading statements and representations, disseminated as aforesaid, respondent has deceived, and is now deceiving, members of the purchasing public situated in various States of the United States concerning the quality and character of respondent's cigars, sold and distributed as aforesaid, and has thereby induced, and is now inducing, members of the public to purchase said cigars under the erroneous and mistaken belief that such false and misleading statements and representations are true. As a result, trade has been diverted unfairly to the respondent from its competitors in said commerce who truthfully advertise, represent and label their respective cigars. In consequence thereof injury has been, and is now being, done by respondent to competition in commerce among and between the various States of the United States, and there is, and has been, placed by respondent in the hands of respondent's dealers and distributors an instrument by means of which they mislead and deceive, and have misled and deceived, members of the purchasing public situated in various States of the United States.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony, and other evidence in support of the allegations of the said complaint and in opposition thereto, taken before Robert S. Hall, an examiner of the Commission theretofore duly designated by it, and briefs filed herein, and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of the Federal Trade Commission Act.

It is ordered, That the respondent, El Moro Cigar Co., a corporation, its officers, representatives, agents, and employees, directly or through

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any corporate or other device, in connection with the offering for sale, sale, and distribution of cigars in commerce, as commerce is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Havana," or any other words, terms or picturizations indicative of Cuban origin, or descriptive of Cuba, alone or in conjunction with any other word or words, to describe, designate, or in any way refer to cigars which are not made from tobacco grown on the island of Cuba.

2. Using the words or expression "Take Outs," "Throw Outs," or any other word or words of similar import or meaning, alone or in conjunction with any other word or words, to describe, designate or in any way refer to cigars, unless such cigars are culled, removed, thrown out, or taken out from more expensive brands or lots of cigars as a result of defects or imperfections arising from normal manufacturing processes and are sold at reduced prices by reason thereof.

It is further ordered, That the respondent shall, within 60 days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
JOSEPH W. GRAFF, INDIVIDUALLY, AND TRADING AS
THE SYLVAN COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 3182. Complaint, July 22, 1937—Decision, Feb. 21, 1939

Where an individual engaged in offer and sale of clocks, pen and pencil sets, radios, traveling bags, and various other articles of merchandise to purchasers in various States; in soliciting sale of and in selling and distributing his said products—

Furnished various devices and plans of merchandising which involved operation of games of chance, gift enterprises, or lottery schemes by which such merchandise was distributed to members of the consuming public wholly by lot or chance, and which involved distribution to members of purchasing public and to dealers of certain literature, order blanks, circular letters, instructions, and push cards for distribution of his said products under a plan or scheme and in accordance with card's explanatory legend by which purchaser paid for chance varying amount, dependent upon number pushed by chance, and received article or articles of merchandise being thus disposed of or nothing other than privilege of punch or push, in accordance with success or failure in selecting feminine name or names corresponding to that or those under card's master seal or two master seals, as case might be, and thereby supplied to and placed in the hands of others, means of conducting lotteries in the sale of his merchandise in accordance with the sales plan above described, under which such merchandise was sold and distributed to purchasing public and amounts paid for chances were determined wholly by lot or chance and involving game of chance or sale of a chance to procure merchandise at a price much less than normal retail prices thereof, contrary to an established public policy of the United States Government and in competition with those who do not sell their merchandise by use of lotteries or games of chance;

With result that many purchasers of his said merchandise were attracted by element of chance involved in his said sales method and were thereby induced to purchase his said products in preference to same or similar merchandise of competitors who do not use same or equivalent methods, and public purchased substantial volume of his said products and trade was unfairly diverted to him from his competitors aforesaid:

Held, That such acts and practices were all to the injury and prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. William C. Reeves*, trial examiner.

Mr. Henry C. Lank and *Mr. D. C. Daniel* for the Commission.

Nash & Donnelly, of Chicago, Ill., for respondent.